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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 117

117

HERMOINE P. RICE,
Petitioner

v.

LILLIAN P. RICE,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

BRIEF OF THE PETITIONER

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PRELIMINARY STATEMENTS

Opinion of the Court Below

The opinion of the Supreme Court of Errors of the State of Connecticut in this case (R. pp. 209-216) is reported in 134 Conn. 440, 58 A. 2nd 523.

Jurisdiction

The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code (28 U. S. C. A. §344 (b), now 28 U. S. C. A. §1257 (3)). A final judgment in this case was rendered by the Supreme Court of Errors of the State of Connecticut (R. p. 217), in which said court found there to be no error upon the appeal of the case from the Superior Court of the State of Connecticut for New Haven County, wherein petitioner specially claimed a right under Article IV, §1, of the Constitution of the United States. By its decision, the Connecticut Supreme Court denied petitioner's claim. Petition for writ of certiorari was filed on June 21, 1948, and was allowed by this Court on October 18, 1948 (R. p. 219).

Statement of the Case

(In the following recital of the facts no reference to the record is made as to facts included in the Report of the State Referee (R. pp. 3-7). Reference to the record is made as to all facts not included in said report.)

Respondent and the decedent, Herbert N. Rice, were married in 1921, and from then until September, 1942, lived in and around New Haven, Connecticut. The decedent was engaged in the automobile business in New Haven until June, 1942, when the business was discontinued and most of the equipment sold or leased. In September, 1942, he obtained wartime employment in Springfield, Massachusetts, and lived in that city until March, 1944. In February, 1944, the decedent told petitioner that he had consulted an attorney in Springfield with reference to a divorce and that the attorney had told him that it would be necessary for him to make his permanent home in Nevada in order to obtain a valid divorce there. He also told petitioner that he intended to remain in Nevada permanently whether or not he secured a divorce there, but that if he were successful in securing a divorce he would ask petitioner to marry him (R. pp. 173-174).

In March, 1944, the decedent left for Nevada, arriving in Reno on March 23, 1944. He commenced a divorce action on May 5, 1944, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, personal service of said action being made on respondent in Woodbridge, Connecticut, on May 12, 1944. Respondent authorized two different attorneys in Reno at apparently two different times to enter a voluntary appearance for her in that action, both of which authorizations were revoked prior to the date on which a default decree could have been entered (R. p. 55). On June 13, 1944, a decree was entered in that action granting the decedent a divorce from respondent. Not later than the day following entry of the decree, the decedent's Reno attorney was advised by the attorney who had received the second authorization to enter a voluntary appearance for respondent that said authorization had been reinstated. However, no appearance *nunc pro tunc* was filed (R. p. 55). The decedent notified petitioner of the decree, and she came to Reno, arriving there on July 3, 1944. On that same day, the decedent and petitioner were married.

Before the decree was granted, the decedent consulted his Nevada attorney with reference to the effect of his taking a wartime job in Herlong, California, upon his Nevada residence as he wanted to maintain such residence. The Nevada attorney explained to the decedent that it would be "all right" for him to take such a job (R. p. 52).

On July 15, 1944, the decedent and petitioner went to Herlong, California, where they both had obtained wartime employment at the Sierra Ordnance Depot, of which the town of Herlong entirely consisted (R. p. 179), although the decedent continued to pay rent on the room he had rented when he had first come to Reno. The two had opened a joint bank account in Reno on July 14, 1944.

After they went to Herlong, the decedent and petitioner continued to occupy the room in Reno on week-ends. In September,

1944, petitioner sent for furniture that she had stored in New Haven, Connecticut, and used it to furnish the quarters that were provided for them at the Sierra Ordnance Depot. In October, 1944, they attempted to register as voters in Nevada, but could not do so because they had not resided in the state for one year.

The decedent and petitioner were working at the Sierra Ordnance Depot and living in their quarters there and at the time of the decedent's death, December 23, 1944.

To determine the widowhood status of the parties to this action and questions concerning inheritance of the decedent's property, respondent brought an action in the Superior Court of Connecticut for New Haven County, seeking a judgment declaring herself to be the widow of the decedent and declaring the Nevada divorce to be colorable only. Due to the death of the trial judge, the record was referred to a State Referee (R. pp. 4-5). The Referee submitted a Report (R. pp. 5-7), which report was accepted by the Judge of the Superior Court, who rendered judgment for respondent. Petitioner appealed to the Supreme Court of Errors of the State of Connecticut (R. p. 42) which held that there was no error (R. p. 209) and confirmed and established the judgment of the Superior Court.

Errors Relied Upon

The Connecticut Supreme Court erred in allowing the ultimate conclusion of the Superior Court to be supported by only remote and irrelevant evidence. The court erred in holding that proof of abandonment of a former domicil be a necessary element in the proof of a change of domicil. The court erred in holding that the judgment of the Superior Court could not be reversed unless the facts showed *as a matter of law* that the decedent was domiciled in Reno. The court erred in allowing the burden on the question of the validity of the Nevada decree to be shifted to petitioner. The court erred in allowing improper inferences from

the evidence to stand as a basis for the ultimate conclusion reached by the Superior Court. The court further erred in allowing the statement that the decedent went to Nevada for the sole purpose of obtaining a divorce to stand as an unreviewable finding of fact. The culmination of all of the above errors was a failure on the part of the Connecticut Supreme Court to give the Nevada decree the full faith and credit to which it was entitled under Article IV, §1, of the Constitution of the United States.

ARGUMENT

Summary

Petitioner seeks to show that the evidence produced by respondent was incompetent to support the ultimate finding and to overcome the presumpiton of validity of the Nevada decree and that the only proper inference that could be made from such evidence was that the Nevada court had jurisdiction to grant the divorce to the decedent. The second point in the argument is that the Connecticut Supreme Court, in sustaining the ultimate conclusion of the Superior Court, utilized circuitous reasoning and based its decision on improper inferences from the facts found.

I. The evidence produced by respondent concerning the period of time from the marriage of respondent and the decedent until February, 1944, was irrelevant and immaterial as support for the ultimate conclusion.

The trial court admitted into evidence a large volume of testimony concerning the relations between respondent and the decedent from the time of their marriage until the decedent left for Nevada, especially with reference to the time subsequent to the date the decedent left New Haven to work in Springfield. It was claimed by respondent, received into evidence by the Superior Court and its reception justified by the Connecticut Supreme Court, to

prove the allegation in respondent's complaint that the decedent did not abandon his Connecticut domicil when he left for Springfield (R. p. 216). Petitioner contends that, granting the admissibility of such evidence for said purpose, it is irrelevant and too remote for the purpose of showing that the decedent's domicil was not changed to Nevada.

It was argued by respondent that such evidence was pertinent to the question due to the concept that domicil is a question of intent, hence evidence bearing on the decedent's intention at any time was proper. However, that concept does not require that no line for remoteness or irrelevancy can be drawn. Domicil is a question of intent, but the intention to make a certain dwelling place one's home must concur with actual presence at that place. Reason demands that evidence concerning a change or lack of change of domicil be restricted to events connected with the actual change of residence and subsequent to such change.

Since *Haddock* v. *Haddock*, 201 U. S. 562, 26 S. Ct. 525, was overruled by this Court in *Williams* v. *North Carolina*, 317 U. S. 287, 63 S. Ct. 207, the question of change of domicil, unfettered by the concept of matrimonial domicil and jurisdictional fault, has emerged as the sole issue in the determination of the validity of most foreign *ex parte* divorces. Decisions of courts of other States which have had occasion to rule on the question reveal that evidence relating to the time subsequent to the date that the party obtaining the divorce removed to the State in which the divorce was obtained is determinative of the question of the jurisdictional foundation for the divorce. In *Hall* v. *Hall*, 199 Miss. 478, 24 So. 2nd 347, the immediate resumption of residence and a medical practice in Mississippi after a foreign divorce was held to justify a finding that the divorce was invalid. In *Hollander* v. *Hollander*, 137 N. J. Eq. 70, 42 A. 2nd 648, the New Jersey residence of the party obtaining the divorce was interrupted only for a period of time little more than the residence requirement of the foreign

State; similarly, in *Cox* v. *Cox*, 137 N. J. Eq. 241, 44 A. 2nd 92, the husband merely took an extended vacation from his position as school principal to obtain a foreign divorce and resumed his position immediately. In both cases the New Jersey court held the divorces to be invalid. In *White* v. *White*, 80 U. S. App. D. C. 156, 150 F. 2nd 157, in which it was found that the defendant ". . . . went to the State of Florida solely for the purpose of obtaining a divorce, and with no bona fide intention of remaining in said state permanently or indefinitely . . . .", it was held that the foreign divorce was invalid. Where it was clear that the husband remained in the foreign State for a few months after the divorce decree merely because of profitable war work and then returned to the State of his original domicil the Pennsylvania court held that the divorce was invalid; *Commonwealth* v. *Berfield*, 160 Pa. Super. 438, 51 A. 2nd 523. In *Kurski* v. *Kurski*, 185 Misc. 97, 55 N. Y. Supp. 2nd 743, the husband returned to New York and his former job six days after the divorce decree was entered without having severed his membership in a New York labor union; the divorce was held to be invalid. In *Reed* v. *State*, 148 Tex. Crim. 489, 187 S. W. 2nd 660, the accused's conviction for bigamy was sustained where it was shown that he had been domiciled in Texas both before and after obtaining a divorce in Oklahoma.

In *Esenwein* v. *Pennsylvania*, 325 U. S. 279, 65 S. Ct. 1118, this Court sustained a decision in which the foreign divorce was held to be invalid where the husband, although he did not return to the State of his pre-divorce domicil, acquired a domicil in a third State soon after obtaining a sister-State divorce.

A rule derived from the above cases would require that a divorce is invalid if the residence of the party obtaining the divorce in the State in which it is obtained constitutes merely a temporary sojourn in that State, which is most adequately proven by facts which show that he left the State soon after the divorce and resided and was

domiciled in another State, either the State of his former domicil or a third State, showing that either his former domicil was not interrupted or that his stay in the State of the divorce was merely an interlude in a change of domicil. The evidence pertaining to the time subsequent to and concerning his first change of residence is the evidence which would be material.

This is further emphasized by the cases in which the sister-State divorces were held to be valid, the evidence pertaining to the move to the State of the divorce and thereafter showing that the party obtaining the divorce did not return immediately to the State of his former domicil or move to a third State. In *Dalton v. Dalton*, 270 App. Div. 269, 59 N. Y. Supp. 2nd 68, the husband and wife separated in 1938 after living together for 13 years. The husband went to Illinois and obtained a default divorce after living there four years. At the time of the institution of the divorce suit the husband was living in Washington, D. C. The New York court held the divorce to be valid. In *Baldwin v. Baldwin*, 28 Cal. 2nd 406, 170 P. 2nd 670, the husband obtained a divorce in Reno on December 16, 1939, approximately five months after he had left California. Both before and after the divorce the husband lived in a hotel and apartments in Reno. It was held that the jurisdiction of the Nevada court was supported by those facts.

Perhaps the most significant of all the cases involving this question is *Estin v. Estin*, 63 N. Y. Supp. 2nd 476. In that case the husband commenced his residence in Reno in January, 1944, having stopped there on his way to California. He commenced a divorce action in April, 1945. He lived in hotels all the time in Reno, and he paid poll and property taxes, had his car registered in and indicated in federal income tax returns that his residence was in Washoe County, Nevada. The wife in New York sued on a prior New York separation decree, payments under which were in default since the date of the Nevada divorce. The New

York court considered two questions: (1) Was the divorce valid? (2) Did the divorce terminate the husband's obligations under the separation decree? The court held that the divorce was valid. The case was appealed on the second issue (271 App. Div. 829, 66 N. Y. Supp. 2nd 421; 296 N. Y. 308, 73 N. E. 2nd 113) and was reviewed by this Court on that issue, 333 U. S. —, 68 S. Ct. 1213, along with the similar case of *Krieger* v. *Krieger*, 333 U. S. —, 68 S. Ct. 1221, which second issue is not material here. In the first written opinion in the history of that case, the court said (63 N. Y. Supp. 2nd at 482):

> "From the foregoing facts there seems to be no doubt that the defendant is now and since January 1944 has been a bona fide resident of the State of Nevada and there is no evidence of any probative force in the record which would indicate anything to the contrary."

In re Paul's Estate, 175 P. 2nd 284 (Dist. Ct. of App., 2nd Dist., Div. 3, Cal.) contains facts which are strikingly similar to the case at bar. H and W were married in 1928 and lived in California. On July 7, 1945, W started a divorce action in California and they executed a separation agreement. On July 12, 1945, H went to Reno; he filed a complaint for divorce there on August 29, 1945. When he went to Reno he told friends he was going to look for a business location outside California. Before the Nevada divorce was granted he wrote to X, the woman he subsequently married, that he liked Reno and was looking for a building to purchase. Prior to the divorce, X went to Reno and had her personal belongings shipped there. After the divorce and after H and X were married they returned to H's former home town in California to collect money due H from his former partner on account of the winding up of their business, but H and X apparently decided to move back. They were living in California when H died. W appealed from the appointment of X as administrator of H's estate. Although W had filed an appearance in the Nevada divorce action, she was held not to be estopped from

claiming the Nevada divorce to be invalid for want of jurisdiction; hence the case can properly be compared with cases involving default divorces. After deciding the preliminary question that W could bring the action, the court held that the above facts supported the lower court's finding that H had acquired a Nevada domicil. It is not known whether or not the above case has been appealed to a higher California court, and it would serve no purpose to discuss whether or not the decision of this Court in *Estin* v. *Estin*, *supra*, makes the jurisdictional question in the above case moot.

Because this Court is open "to consider claims . . . that the courts of one State have not given the full faith and credit to the judgment of a sister-State that is required by Art. IV, §1, of the Constitution." (*Williams* v. *North Carolina*, 325 U. S. 226, 233, 65 S. Ct. 1092, 1096) petitioner contends that the above cases illustrate a rule that is a logical outgrowth of the second *Williams* case, *supra*. Because "The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant." (325 U. S. at 233, 65 S. Ct. at 1097), and because "such issue of jurisdictional fact . . . [must be] left for fair determination by appropriate procedure, and . . . a finding adverse to the necessary foundation for any valid sister-State judgment . . . [must be] amply supported in evidence . . ." (325 U. S. at 234, 65 S. Ct. at 1097), a State court must carefully scrutinize all the evidence offered to upset a sister-State decree as to its relevancy and materiality. Petitioner contends that the second *Williams* case, *supra*, requires that, in order to establish a prima facie case of lack of jurisdictional basis for a sister-State divorce decree, it must be shown by material and competent evidence that the person who acquired the divorce established a domicil in another state soon thereafter or returned to his former State under circumstances that indicate he was either making his home there anew or returning to it. The facts of the *Williams*

case itself bear this out, for there the guilty parties returned to North Carolina immediately after they obtained their Nevada decrees (325 U. S. at 235, 65 S. Ct. at 1097). Therefore, the only relevant facts are those which pertain to the decision to make the first change of residence and the time subsequent to such decision; facts pertaining to a period prior to such decision have no place in the proof of the lack of change of domicil. It has already been shown that the decedent's actions and statements prior to his decision to depart from Springfield were admissible only to support Paragraph 3 of respondent's complaint (R. p. 1). Furthermore, the record indicates that although said paragraph was denied in petitioner's answer (R. p. 3), petitioner was prepared to and did admit that the decedent's domicil was in Connecticut until the time that he formed the intention of making Nevada his home (R. pp. 57-58). Nevertheless, the evidence was admitted over objection of counsel.

II. The evidence produced by respondent concerning the period of time subsequent to February, 1944, and all proper inferences therefrom do not support the ultimate conclusion of the trial court.

The evidence pertaining to the above mentioned period produced by the respondent appears on pages 45-50 of the record. It contains a transcript of the Nevada divorce proceedings and the deposition of the decedent's attorney in Reno. The facts produced by such evidence are that the decedent intended to remain indefinitely in Nevada and intended not to return to Connecticut, and that he consulted his attorney about the effect on his Nevada residence of his taking a war job in Herlong, California. Respondent claims that the decedent's move to Herlong after the divorce indicates that his Nevada residence did not amount to domicil. However, the decedent's attorney had told him that it would be "all right" for him to take a position at the Sierra

Ordnance Depot in Herlong (R. p. 52). Such evidence could scarcely permit an inference that the decedent's domicil was thereby changed, especially in view of the fact that Herlong, California, consisted of nothing other than the Army base (R. p. 179), or that prior to his consultation with the attorney it had been other than Nevada. See *Dalton* v. *Dalton*, 270 App. Div. 269, 272; 59 N. Y. Supp. 2nd 68, 71, and cases cited.

III. The conclusion reached by the trial court is not justified by the subordinate facts found.

The Report of the State Referee (R. pp. 5-7) as amended (R. p. 7) and corrected (R. p. 31) was accepted by the trial court in its declaratory judgment (R. p. 41). With the exception of Paragraph 5 of the Report (R. p. 6), wherein it is stated that the decedent went to Reno "for the sole purpose of obtaining a divorce", the conclusion reached in Paragraph 10 of the Report comes as a complete surprise after the reading of Paragraphs 1 to 9. The only proper evidence produced by respondent upon the question of the decedent's intention is his testimony in the divorce action and his statement to his Nevada attorney (R. pp. 45-56), the remaining evidence produced by respondent having been admissible for only a special purpose. Hence, the only reason for including the statement in Paragraph 5 above referred to in the finding must have been the Referee's apparent disbelief of petitioner's statements. Disbelief of statements cannot be raised to the stature of evidence as to the opposite of such statements. This has been the Connecticut rule. See *Walkinshaw* v. *O'Brien*, 130 Conn. 151, 153, 32 A. 2nd 639, and cases cited. It would seem that the proper effect to be given a disbelief of the statements is to remove them from consideration. See 20 Am. Jur. 1033-1035 as to testimony manifestly untrue or contrary to the laws of nature. However, at most the effect could be to establish an inference in this case that *one* of the motives of the

decedent in going to and remaining in Nevada was to get a divorce and return to Connecticut. Even if, *arguendo*, disbelief of the statements were allowed to raise a suspicion that the decedent's *sole* motive in going to and remaining in Nevada were to obtain a divorce such suspicion should not be allowed the weight necessary to establish the ultimate conclusion reached by the trial court.

> "Nor will a suspicion of fraud in the prosecution of a divorce action by such party in the foreign jurisdiction avail to defeat the foreign decree . . . ." *Baldwin* v. *Baldwin*, 163 P. 2nd 54, 56 (Dist. Ct. of App., 2nd Dist., Div. 2, Cal.).

In *Meade* v. *Mueller*, 139 N. J. Eq. 491, 52 A. 2nd 157 at 159, the court said:

> "No evidence was produced at the hearing, except the documents above referred to, to show that Mrs. Meade at the time the Nevada decree was granted was not domiciled in Nevada. The defendant's proofs raise a suspicion that the purpose of the wife in going to Nevada was to obtain a divorce and that she did not intend to become a permanent resident there. Mere suspicion, however, is not sufficient to justify this court in declaring that the Nevada decree is invalid in this state . . . ."

The fact that one of the motives for change of residence is to take advantage of more liberal laws cannot prevent a change of domicil from taking place. Restatement, *Conflict of Laws*, Sec. 22, *Comment b*, 12, p. 46.

With the statement in Paragraph 5 of the Report disregarded, it is apparent that the story told by Paragraphs 1 to 9 of the Report is consistent only with the conclusion that the decedent moved to Reno to remain indefinitely. The use of the word "indefinitely" by the Referee indicates that he felt that an intention to remain indefinitely is something less than the intention necessary to establish a domicil. The rule of this Court is that an inten-

tion to remain in a place indefinitely, *coupled with actual residence in the place*, is sufficient to establish a change of domicil.

> "The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere. Story on *Conflict of Laws*, Sec. 43,—or as Mr. Dicey puts it in his admirable book 'The absence of any present intention of not residing permanently or indefinitely in' the new abode." *Williams* v. *Oscentum*, 232 U. S. 619, 624, 34 S. Ct. 442.

Furthermore, this was the Connecticut rule; *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689, 694; 92 A. 684, 686. The only justification available to the Connecticut Supreme Court of the ultimate finding based upon the subordinate facts is that the Report does not state what the decedent's intention was, but what he said it was (R. p. 215), even though there is no finding that such declarations of intention were untrue or disbelieved. The Connecticut Supreme Court justified the ultimate finding upon the apparent disbelief of those statements (R. p. 215) and also held that if the Referee misinterpreted the meaning of the word "indefinitely" it was not prejudicial, because of his apparent disbelief of the decedent's statement (R. p. 216). Certainly such a misinterpretation would be material; if the Referee believed that the decedent intended to remain in Nevada indefinitely he would have to find that the decedent was domiciled in Nevada. See *Williams* v. *Oscentum*, *supra*, *Gildersleeve* v. *Gildersleeve*, *supra*. Furthermore, it is evident that the Connecticut Supreme Court justified the ultimate finding of lack of domicil by circuitous reasoning: The only basis for saying that the Referee disbelieved the decedent's statements is the conclusion reached by him in Paragraph 10 of the Report. This disbelief is used to justify the fact that the decedent did not have a bona fide domicil in Nevada. By holding that an inference from the ultimate fact provides the necessary subordinate facts to justify the ultimate fact, the final

conclusion of the Referee is used by the Connecticut Supreme Court as a basis for its own support.

That the decedent went to Reno "for the sole purpose of obtaining a divorce" (R. p. 6) is also considered by the Connecticut Supreme Court to be a subordinate fact (R. pp. 215, 216) and used to justify the ultimate conclusion. It has already been argued that such a finding was not a proper inference from the evidence. However, the decedent's presence in Nevada is undisputed, leaving as the only ultimate fact to be found or conclusion to be drawn the state of mind of the decedent when he went to Nevada or while he was there. Therefore, to state that he went there for the sole purpose of obtaining a divorce is to state that his domicil was not changed. This Court has said that "State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact . . . ." *Williams* v. *North Carolina*, 325 U. S. 226, 236, 65 S. Ct. 1092, 1098. The use of such statement as a factual basis for the ultimate conclusion or as a reason for upholding such conclusion is another example of the circuitous reasoning employed by the Connecticut Supreme Court in its decision.

The State Referee apparently laid undue stress upon the fact that the decedent lived in a rented room in Reno, as the Report finds that he "never established a *home* in Reno. He intended to do so in the future if he did not like it at Herlong . . . ." (R. p. 7) (Italics added). The finding no doubt refers to the fact that the decedent had stated that he desired to build or purchase a house or building in Reno (R. pp. 53, 157). However, one need not occupy such a dwelling place in order to establish a "home" in the domiciliary sense.

> "A leaves the state in which he has been domiciled and comes to X, a city in another state, intending to make his home in the city; he lives in temporary lodgings, in hotels and clubs. He is domiciled in X." Restatement, *Conflict of Laws*, §16, Illustration 1, p. 35.

IV. The entire opinion of the Supreme Court of Errors of the State of Connecticut reveals that the burden was improperly placed upon petitioner to establish the validity of the Nevada decree.

It is quite true that parts of the opinion of the Connecticut Supreme Court contain accurate statements regarding its duty as a reviewing tribunal. However, the operative holdings of the opinion, taken separately and cumulatively, show that the court decided that petitioner had failed to establish the Nevada court's jurisdiction rather than whether or not respondent had produced sufficient evidence to overcome the presumption of such jurisdiction. On page 213 of the Record is the statement:

> "The question for solution is whether under the applicable principles of law the referee was warranted in making this finding and whether the court was justified in rendering its judgment thereon."

Then further along are the following quotations (R. pp. 213, 214):

> "'To constitute domicil the residence at the place chosen for the domicil must be actual, and to the fact of residence there must be added the intention of remaining permanently; and that place is the domicil of the person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with the present intention of making it his home, unless something shall happen to induce him to adopt some other permanent home.' *Mills* v. *Mills*, 119 Conn. 612, 617, 179 A. 5."

> "'When the parties left this State with the intention of never returning, their domicil in Connecticut was not thereby changed. The former domicil persists until a new one is acquired.' *McDonald* v. *Hartford Trust Co.*, 104 Conn. 169, 177, 132 Atl. 902. *Mills* v. *Mills*, *supra*. Therefore proof of the acquisition of a new domicil of choice is not

complete without evidence of the abandonment of the old." *Morgan* v. *Morgan*, 103 Conn. 189, 196, 130 A. 254. As we stated in the *McDonald* case, supra, one's intention in departing from his domicil, not to return to it constitutes no abandonment at that time; 'the law does not permit one to abandon nor recognize an abandonment of a domicil until another has been established . . .'"

It is then held that petitioner's appeal could not succeed, in view of the above quotations, "unless the subordinate facts are sufficient to establish as a matter of law that Rice had acquired a new domicil in Nevada." (R. p. 214). For subordinate facts to establish a conclusion as a matter of law they must be such that they permit of no other conclusion. This certainly is not the standard set up by this Court in *Williams* v. *North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, nor is it assumed to be by the courts of other States (see I, *supra*). Such a requirement is tantamount to a shift of the burden of proof.

To show that the conclusion was supported by the subordinate facts the Connecticut Supreme Court (R. p. 215) briefly recites the facts found in Paragraphs 1 to 9 of the Referee's Report (R. pp. 5-7), stating as "subordinate facts" that the decedent went to Reno "for the sole purpose of getting a divorce" and that he lived in a rented room in Reno. The propriety of designating them subordinate facts has already been discussed (see III, *supra*). However, the effect thereof is to place upon petitioner the unfair burden of disproving, or the penalty for having failed to disprove respondent's entire case.

The Connecticut Supreme Court implied that the duty of proving abandonment of the Connecticut domicil was necessary to show a change of domicil (R. pp. 213-214). Likewise, the quotations from *Messenger* v. *Messenger*, 188 Iowa 367, 373, 176 N. W. 260, and *Cox* v. *Cox*, 137 N. J. Eq. 241, 245, 44 A. 2nd 92, indicate that petitioner had the burden of corroborating the statements made by the decedent while in Nevada. The burden in this case, as

stated in the second *Williams* case *supra*, was upon respondent to establish by ample evidence that the decedent was not domiciled in Nevada at the time he commenced the divorce action. The rule of this Court regarding change of domicil is stated in *Williams* v. *Oscutum*, *supra*, and in *Williams* v. *North Carolina*, 325 U. S. 226, 236, 65 S. Ct. 1092, 1098, in the extract from the charge to the jury, and the rule recognizes only two elements: (1) residence at the new place, and (2) a present intention of remaining there either permanently or indefinitely. Assuming that declarations as to state of mind by a declarant now unavailable are merely self-serving statements in a case in which such state of mind is in issue, it still remains that the test as to whether or not respondent had sustained the burden imposed upon her does not involve corroboration of such statements by petitioner. Such statements constituted evidence of the principal fact in issue and should not have been summarily dismissed as of "questionable evidential value" or as purely self-serving statements especially when accompanied by evidence of actions consistent therewith. *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, 12 S. Ct. 909; 3 Wigmore on Evidence, 2nd Ed., 1923, §1727, p. 703-4.

Conclusion

Petitioner contends that respondent, being a litigant claiming that a sister-State divorce decree was invalid, was required by Art. IV, §1 of the Constitution of the United States, as applied by this Court and by the courts of other states, to produce material and concrete evidence that the decedent did not acquire a domicil in Nevada. Certainty and predictability are of extreme importance in cases of this nature, and it is contended that these features will be best preserved within the confines of the Constitution, by requiring that the sister-State judgment be considered valid until, and only until, there is produced evidence concerning the actions and statements of the person in question tending strongly to show

that his residence in the sister State was solely for the purpose of obtaining a divorce or for other purely temporary purposes. It is clear in this case that all of the evidence falls far short of that criterion. Petitioner was necessarily confined to the claim that respondent's evidence was insufficient to support the ultimate conclusion reached. It should be pointed out, however, that the evidence produced by petitioner was consistent only with the conclusion that the decedent was domiciled in Nevada. What the decedent did and what he said after reaching Nevada were the important facts, all of which support petitioner's claim. It also should be pointed out that this Court is under no more disadvantage in reviewing the record than was the State Referee, as he rendered his findings and conclusion solely upon a written transcript of the evidence and the exhibits.

An examination of the entire opinion of the Supreme Court of Errors of the State of Connecticut in the light of the evidence considered reveals that the reasoning that the Court used to justify the ultimate conclusion of the Superior Court is superficial and illogical and characterized by an assumption that everything said in Nevada concerning a divorce should be disbelieved and taken to be evidence of the opposite of what is said. Finally, the opinion stands for the proposition that all actions taken by a client upon the advice of his lawyer should, when such actions and advice pertain to divorce, be viewed with suspicion and distrust, a proposition that cannot be justified.

Wherefore, petitioner respectfully requests that this Court reverse the judgment of the Supreme Court of Errors of the State of Connecticut and direct entry of judgment for petitioner.

Respectfully submitted,

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